IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1782

AFW FABRIC CORP., *et al.*,

Petitioners,

v.

ARNOLD MARSHEL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MARTIN A. COLEMAN
Attorney for Respondent
645 Fifth Avenue
New York, New York 10022

Of Counsel:
RUBIN BAUM LEVIN CONSTANT
& FRIEDMAN
645 Fifth Avenue
New York, New York 10022

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Statement of the Case

Petitioners are seeking review of a decision of the Court of Appeals for the Second Circuit which reversed the District Court's denial of a preliminary injunction to restrain them from carrying out a "merger." As conceded by petitioners, the merger had no legitimate corporate purpose; its only purpose was to divest the public of its equity interest in Concord Fabrics Inc. ("Concord"), a New York corporation whose shares trade on the American Stock Ex-

change, at a time and price determined entirely by the individual petitioners for their sole benefit.

The individual petitioners, who own 68% of Concord's outstanding stock, and who had previously sold stock to the public at a price of $20 per share, had devised a scheme whereby they would eliminate the public's interest in Concord and become the sole owners of the corporation. They hoped to achieve their goal by causing Concord to merge with AFW Fabric Corp., a company not engaged in any business and formed by them for the sole function of participating in the merger. The merger terms would have given the individual petitioners ownership of all outstanding shares of Concord while the public shareholders of Concord would have received, out of Concord's treasury, the sum of $3 per share. Since §903 of the New York Business Corporation Law (Pet. App. 42a) provides that a merger shall be adopted by vote of the holders of two-thirds of all outstanding shares, and since the individual petitioners owned more than the requisite percentage, they believed that their scheme must succeed.

Respondent, a public shareholder of Concord who had paid $22.25 per share for his 500 shares, and had held them continuously since early 1969 (Complaint, ¶6), sought to enjoin the proposed merger on the grounds that it violated both the federal securities laws and the corporate laws of New York. He complained that the merger was a sham and would constitute a fraud upon Concord itself, as well as upon its public shareholders, since Concord would have been required to expend approximately $1,600,000 without a business reason in order to acquire the public's stock interest.

The Court of Appeals held that the challenged merger, whether or not technically valid under state law (an issue it did not reach), is conduct violative of §10b of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1970), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5. It accordingly reversed the District Court's denial of a preliminary injunction to enjoin the consummation of the merger during the pendency of the litigation.

Thereafter, on March 9, 1976, the petitioners consented to the entry of a permanent injunction in a state court proceeding which had been brought against them by the Attorney General of the State of New York after the institution of this action. By its terms, the petitioners were

> ". . . permanently enjoined, barred and restrained from directly or indirectly effectuating the proposed merger of Concord and AFW, the terms of which merger are set forth in a Notice of Special Meeting of Shareholders of Concord dated March 17, 1975 and the accompanying Proxy Statement, and from any act in aid or furtherance of the merger."

A copy of the permanent injunction is annexed as an appendix to this brief.

Reason for Denying the Writ

In denying a rehearing en banc, the Court of Appeals stated that this case and *Green* v. *Santa Fe Industries, Inc.*, —— F.2d ——, [1975-1976 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,447 (2d Cir. 1976)* were of "extraor-

* A petition for certiorari in *Green* v. *Santa Fe Industries, Inc.* was filed on June 2, 1976 (Dkt. 75-1753).

dinary importance'' and should be accepted by this Court under its certiorari jurisdiction. Nevertheless, petitioners' consent to a permanent injunction against the challenged merger, entered almost a month after the announcement of the opinion of the Court of Appeals, has rendered moot the issues which they now ask this Court to decide.

Both questions presented in the petition relate to the propriety of the Second Circuit's invocation of §10(b) of the Securities Exchange Act of 1934 in order to reverse the denial of a preliminary injunction against a merger. Since the merger can no longer take place because of the permanent injunction issued by the state court, there is no justifiable controversy to place before this Court. In *Roe* v. *Wade,* 410 U.S. 113, 125 (1973) this Court stated that "[t]he usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." This rule was applied in *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974) where the plaintiff no longer had a justiciable controversy by the time his case reached this Court. The instant case presents a similar situation. As in *DeFunis,* the necessary degree of contentiousness is no longer present. *Golden* v. *Zwickler,* 394 U.S. 103 (1969).

Petitioners devote but a single sentence of their petition in attempting to explain why the questions presented by them are still justiciable. They state that "[n]evertheless, petitioners remain liable in the instant action for potential damages based on the Second Circuit's decision." (Pet., p. 8). However, petitioners will be liable in all

events for the unnecessary expenses to which they have subjected Concord. The monies which they caused Concord to expend in furtherance of a transaction which has been conceded by them to be devoid of business purpose are recoverable by Concord whether or not petitioners' conduct violated the federal securities laws. *Abrams* v. *Allen,* 297 N.Y. 52, 74 N.E.2d 305 (1947). See, generally, 3A Fletcher, Cyclopedia Corporations §1102 (1975 Revised Volume).

Any other damages which petitioners have in mind would surely have to await the outcome of a trial and are, at this point, merely speculative and do not present an existing case or controversy for adjudication. In *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974) this Court stated:

> "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. *Massachusetts* v. *Mellon,* 262 U.S. 447, 488 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' *Golden* v. *Zwickler,* 394 U.S. 103, 109-110 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941); *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89-91 (1947)."

It is accordingly submitted that petitioners' inability to resurrect the merger because of the permanent injunction has mooted the issues which they are asking this Court to review.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN A. COLEMAN
Attorney for Respondent
645 Fifth Avenue
New York, New York 10022

Of Counsel:
RUBIN BAUM LEVIN CONSTANT
& FRIEDMAN
645 Fifth Avenue
New York, New York 10022

APPENDIX

Final Judgment

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, Pearl and Centre Streets, Borough of Manhattan, State of New York, on the 9th day of March, 1976.

Present:

Hon. Xavier C. Riccobono, Justice

Index No. 40678/75

People of the State of New York,
Plaintiff,

against

Concord Fabrics, Inc., AFW Fabric Corp., Alvin Weinstein, Frank Weinstein and David R. Caplan,
Defendants.

The plaintiff brought this action pursuant to section 353 of the General Business Law of this State by the service of a summons and complaint upon the above named defendants seeking a judgment permanently enjoining and restraining said defendants from consummating a proposed merger of Concord Fabrics Inc. ("Concord") and AFW Fabric Corp. ("AFW"), the terms of which merger are set forth in a Notice of Special Meeting of Shareholders of Concord dated

March 17, 1975 and the accompanying Proxy Statement, as well as from violating the provisions of Article 23-A of the General Business Law of this State.

Now, on reading and filing the summons dated April 4, 1975; the complaint verified on April 4, 1975; the affidavit of Eugene D. Berman, Deputy Assistant Attorney General, sworn to April 4, 1975; the affidavit of Sidney J. Silberman, sworn to April 15, 1975; and the consents of the defendants in which they specifically deny each and every allegation of the complaint herein and the aforementioned affidavit of Eugene D. Berman, and due deliberation having been had,

On motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for plaintiff, it is

ORDERED, ADJUDGED AND DECREED that the defendants be permanently enjoined, barred and restrained from directly or indirectly effectuating the proposed merger of Concord and AFW, the terms of which merger are set forth in a Notice of Special Meeting of Shareholders of Concord dated March 17, 1975 and the accompanying Proxy Statement, and from any act in aid or furtherance of the merger; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants be permanently enjoined, barred and restrained from directly or indirectly engaging in any fraudulent practice as defined in section 352(1) of the General Business Law of this State, in connection with any tender offer or merger or other transaction for the purpose of returning Concord to the private ownership of the individual defendants Alvin and

Frank Weinstein or members of their families; and it is further

ORDERED, ADJUDGED AND DECREED that the Attorney General of the State of New York may take such further application under the provisions of this judgment and decree as plaintiff may be advised is proper and necessary for the enforcement of this judgment and decree, all pursuant to Article 23-A of the General Business Law of this State and other provisions of law applicable thereto; and it is further

ORDERED, ADJUDGED AND DECREED that costs be awarded to plaintiff pursuant to section 8303(a)(6) of the Civil Practice Law and Rules in the total amount of Six Thousand Five Hundred Dollars ($6,500.00), consisting of Two Thousand Dollars ($2,000.00) in respect of AFW, Two Thousand Dollars ($2,000.00) in respect of Alvin Weinstein, Two Thousand Dollars ($2,000.00) in respect of Frank Weinstein and Five Hundred Dollars ($500.00) in respect of David R. Caplan.

Enter

XCR
J. S. C.

Norman Goodman
Clerk

FILED
Mar 10 1976
New York
Co. Clerk's Office